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IN THE
COURT OF APPEALS OF INDIANA

KELLY JO EZRA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0804-CR-380
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0709-FB-58

October 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Kelly Jo Ezra pleaded guilty to welfare fraud[1] as a Class D felony and was sentenced to three years executed in the Department of Correction. She appeals, raising the following restated issue: whether her fully executed sentence was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

Between June 2006 and July 2007, Ezra was in prison yet receiving Social Security benefits at her home address. Although she knew that her incarceration and the fact that her child had been removed from her household disqualified her from receiving such benefits, Ezra failed to inform the Social Security Administration ("SSA") of these facts; thus, she continued to collect checks from the SSA.[2] On September 4, 2007, the State charged Ezra with welfare fraud as a Class C felony, welfare fraud as a Class D felony, and two counts of theft, each as a Class D felony.

On February 1, 2008, Ezra pleaded guilty to welfare fraud as a Class D felony pursuant to a plea agreement. In exchange, the State agreed to drop the three other charges and not to pursue probation revocation in two other cases. While the plea agreement required restitution, it left sentencing open to the trial court's discretion. During the plea hearing, Ezra reported that she suffers from bipolar disorder, seizures, and a serious drug addiction. In response, the trial court stated: "I want an evaluation by Dr. Wendt, rule out bipolar. And

[1] *See* IC 35-43-5-7.

[2] According to the probable cause affidavit, Ezra arranged for her sister, her boyfriend's mother, and her boyfriend to sign and/or cash the checks. Apparently, the boyfriend then used the proceeds from the checks to pay the couple's bills.

she admits to being a crack cocaine addict. Let's see where she is." *Tr*. at 13. Accordingly, in addition to a presentence investigation report being prepared, a separate evaluation was conducted to assess more fully Ezra's drug issues and mental status.

At the sentencing hearing on February 28, 2008, the trial court found the following mitigators: (1) Ezra completed substance abuse treatment while previously incarcerated; and (2) Ezra is bipolar. *Appellant's App*. at 60. It also found the following aggravators: (1)Ezra's criminal history; (2) the sentence on the present conviction was non-suspendable; (3) Ezra's substance abuse history; (4) Ezra committed the instant offense while incarcerated; and (5) prior attempts at rehabilitation have not worked. *Id*. at 60-61. The trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Ezra to three years executed in the Department of Correction. Ezra now appeals.

DISCUSSION AND DECISION

Appellate courts may revise a sentence after careful review of the trial court's decision if they conclude that the sentence is inappropriate based on the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). Although Rule 7(B) does not require this Court to be extremely deferential to a trial court's sentencing decision, this Court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The defendant bears the burden of persuading the appellate court that his or her

sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007). Our review under Indiana Appellate Rule 7(B) is not limited to the duration of a sentence; "[t]he place that a sentence is to be served is an appropriate focus for application of our review and revise authority." *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007).

Ezra argues that her sentence was inappropriate in light of the nature of her offense and her character. She specifically contends that a three-year executed sentence was inappropriate due to her mental health issues and the psychiatric evaluation completed prior to sentencing, which recommended that placement in a halfway house would be "an excellent match for the needs presented by . . . Ezra." *Tr*. at 26. She does not challenge the duration of her sentence; she instead claims that her placement was inappropriate. She alleges that a more appropriate sentence would have been three years with only six months executed and the remaining two-and-a-half years suspended, with some time spent in a halfway house and the rest served on probation.

In arguing that her sentence is inappropriate, Ezra cites Article 1, Section 18 of our Indiana Constitution. She maintains that her sentence wholly fails to account for the clinical evidence of what will most likely accomplish reformation in light of her needs. *Appellant's Br*. at 7. She asserts that she is hardly the worst of the worst, having "lived a substantially law-abiding life for her first 32 years" – apart from her drug abuse, which developed while she was "self-medicating" her mental illness. *Id*. at 9. She also challenges the conclusion that prior attempts of rehabilitation have failed because she committed the current crime as soon as she entered the Department of Correction. Thus, she argues, attempts at rehabilitation had not yet started and, therefore, had not had a chance to work.

Article 1, Section 18, of the Indiana Constitution states: "The penal code shall be founded on the principles of reformation, and not of vindictive justice." The longstanding rule is that this section "applies only to the penal code *as a whole*, not to individual sentences." *Henson v. State*, 707 N.E.2d 792, 796 (Ind. 1999) (emphasis added). To the extent Ezra attempts to apply Section 18 to the specific circumstances of her case, her claim is not cognizable. *See Ratliff v. Cohn*, 693 N.E.2d 530, 542 (Ind. 1998) ("[s]uch particularized, individual applications are not reviewable under Article [1], Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges.").

Ezra does not allege that the court failed to identify all significant mitigating and aggravating circumstances or explain why each circumstance has been determined to be mitigating or aggravating. As a result of the 2005 amendments to Indiana's criminal sentencing statutes, the weight accorded to aggravators and mitigators is no longer subject to appellate review in non-capital cases. *See Krempetz*, 872 N.E.2d at 613. Accordingly, to the extent Ezra claims that the court should have given more weight to her mental illness or less weight to her criminal history, we cannot address such challenges. Notwithstanding the prohibition on appellate reweighing of mitigators or aggravators, we can and will examine the appropriateness of the sentence.

As to the nature of the offense, Ezra knowingly concealed information that would have made her ineligible to receive welfare checks. Specifically, she failed to tell the SSA that she was incarcerated and that her daughter had been removed from her care and custody, which she was required to do pursuant to her application for benefits. Thus, while serving

time for forgery, Ezra arranged for her boyfriend and relatives to cash the SSA checks and use the money to pay bills. During her incarceration, Ezra actually signed several of the checks herself and, thereafter, authorized others to sign for her. As a result of her actions, Ezra was charged with four felonies.

As for her character, around 1998 or 1999, Ezra was diagnosed with bipolar disorder and obsessive/compulsive disorder, for which she received medication and counseling. Ezra also developed a serious drug addiction prior to her incarceration. She has criminal history involving crimes of dishonesty, which consisted of four Class C felony forgery convictions and a Class A misdemeanor conviction for check deception. She was placed on probation as a result of her felony convictions, but violated the terms of probation, which resulted in a petition to revoke probation. Because of this violation, the trial court modified her sentence to be served on Community Corrections. Ezra subsequently violated her home detention and was then sent to the Department of Correction. The instant offense occurred while she was incarcerated for these violations. Ezra also has a previous charge of criminal conversion, which was resolved through a deferment of prosecution. In addition, another petition to revoke probation was pending at the time of her sentencing.

In light of the nature of the offense and Ezra's character, we believe that her three-year executed sentence was appropriate. Ezra had criminal history that consisted wholly of crimes of dishonesty, including the instant offense. Further, it appears that the prior attempts at rehabilitation including probation and Community Corrections have not worked. We conclude that Ezra's criminal history more than justified her sentence and placement in the Department of Correction.

Affirmed.

VAIDIK, J., concurs.

CRONE, J., dissents with separate opinion.

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CRONE, Judge, dissenting

A plea of guilty to a D felony, plus a prior history, equals a maximum, fully executed sentence. On the surface, affirmance would seem to be in order. However, to affirm this sentence is to take a myopic view of the particular facts presented and to ignore the change in thrust of Indiana Appellate Rule 7(B).

Appellate Rule 7(B) authorizes this Court to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *see Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005) (explaining that when our supreme court amended Appellate Rule 7(B), it changed the thrust from a prohibition on revising sentences

unless certain narrow conditions are satisfied to an authorization to revise sentences when certain broad conditions are met).

In *Anglemyer v. State*, our supreme court stated, "regarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed." 868 N.E.2d 482, 494 (Ind. 2007). Here, the advisory sentence is one and one-half years, and, in Ezra's case, at least six months was nonsuspendable. *See* Ind. Code § 35-50-2-7; *see also* Ind. Code § 35-50-2-2. The nature of Ezra's offense is that she knowingly concealed information (incarceration and related removal of her daughter from her care) that should have made her ineligible to receive SSA checks. Ezra accepted SSA checks, and with the help of Ezra's boyfriend and relatives, the money was used to pay bills. Considering that Ezra's incarceration was essentially an element of the crime, to also use that fact as an aggravator seems questionable. *See Burgess v. State*, 854 N.E.2d 35, 41 (Ind. Ct. App. 2006) ("A trial court may not use a factor constituting a material element of an offense as an aggravating circumstance" because it has already been factored into the crime).

In reviewing Ezra's criminal history as it reflects on her character, the timeline is telling. Ezra was first convicted of a crime (four counts of forgery) in 2004, at the age of thirty-two. Appellant's App. at 85, 91. Since then, one misdemeanor conviction for check deception occurred in 2006, one petition to revoke probation was granted, and a separate petition to revoke probation is pending. *Id*. According to the presentence report, around 1998 or 1999, Ezra was diagnosed with bipolar disorder, a serious mental illness, and obsessive/compulsive disorder, received medication and counseling, and developed a severe

drug addiction; her criminal history, which is entirely nonviolent, followed. *Id*. at 91-92.

Additional details regarding Ezra's character may be gleaned from the February 27, 2008 report prepared by Dr. Jeffrey Wendt,[3] who the court selected and appointed to examine Ezra. An excerpt from the report is included below:

> Concerning Ms. Ezra's substance abuse or dependence, all of the methods employed during the current examination (SSAI, ASI, and clinical interview) were consistent in concluding that Ms. Ezra meets the diagnostic criteria for a substance dependence diagnosis. It is imperative that any sentence she receives for the current charges against her include a period of intensive substance abuse treatment. *It is my opinion that her substance dependence is closely tied to her mental health condition. Her substance use should also be addressed in the context of psychotherapy, as it is my opinion that her drug use is directly related to her mental health issues.* The self-medication hypothesis proposes that people often use alcohol or other drugs as a means of experiencing relief from existing psychiatric or emotional problems. Consequently, the substance is used repeatedly, and for some people, leads to chronic use in order to manage mood or anxiety. Ms. Ezra described symptoms which she attempted to ameliorate through voluntary intoxication. She described self-medicating with drugs, saying, "My mind races, it still does, about all the things that happened in my life. I don't want to remember, guilt for what I've done to people." The emotional motivation for her substance use is offered for consideration in sentencing. She said that she had not used any illicit substances for at least the last year and a half, and offered to submit to hair follicle drug testing as proof of her claim. Although she reports being sober for the past 1 ½ years, the majority of this time she has been incarcerated, therefore her need for treatment remains high. When asked regarding her need for substance treatment, she said, "I think it's pretty important. I know how severe my addiction is, and I need to know how not to relapse." Ms. Ezra should be required to participate in an intensive substance dependence treatment program with external controls, such as frequent drug testing. She would benefit from AA and/or NA meetings and sponsorship.
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> *Concerning Ms. Ezra's current mental health, she exhibits symptoms of a current Major Depressive Episode in the context of Bipolar II Disorder. Her*

[3] Dr. Wendt's report was produced after reviewing the charges, the affidavit of probable cause, the plea agreement, the presentence investigation report, and the probation intake notification; administering psychological testing and substance abuse measures, and performing a three-and-one-half-hour clinical interview of Ezra on February 16, 2008. Appellant's App. at 112.

> *mental health appears to also have a causal relationship on her history of legal problems, as her medication use and substance use were inversely related. That is, she said that when she had stopped taking her psychotropic medications, her substance use had increased.* It is noted that her original conviction for Forgery occurred when she illegally cashed checks in order to obtain money to sustain a prolonged crack cocaine binge. *It is noted that her current charges stem from the receipt of payments from the government due to Ms. Ezra's mental disability, and her behavior is consistent with the impulsivity and poor judgment associated with Bipolar Disorder*. She reported a history of traumatic abuse as a child and adolescent in the form of chronic physical, emotional, and sexual abuse. She said that during her incarceration she has been treated with antidepressant medication and medication to treat her seizures. *Currently, her seizure medication is Tegretol, which is also often prescribed as a mood stabilizer for persons with Bipolar Disorder. However, when she was in the Department of Corrections, she was prescribed Phenobarbital which does not have the mood stabilizing benefits*. It is clear that Ms. Ezra suffers from significant difficulties with anxiety. Her anxiety has elements of several overlapping disorders, including Obsessive Compulsive Disorder, Posttraumatic Stress Disorder, and Panic Disorder. Therefore, I offer a diagnosis of Anxiety Disorder, Not otherwise Specified. She reported that she had been under the care of a psychiatrist in the past, and it is recommended that Ms. Ezra be required to participate in psychiatric treatment and weekly psychotherapy. It is essential that mandated psychiatric treatment be included in any sentence Ms. Ezra receives to ensure mood stability and decrease the probability of substance relapse.
>
> *It is my opinion that Ms. Ezra does not present with an overall criminal mindset. Rather, it is my opinion that her behavior that has led to legal difficulties appears to be a response to intoxication and addiction spurred on by self-medication due to an inability to cope with environmental stressors. She said that she had been approved for placement at the Home With Hope, and it is my opinion that this facility provides an excellent match for the needs presented by Ms Ezra. In summary, Ms. Ezra presents with a history of abuse as a child, which led to chronic depression and related psychiatric symptoms. She apparently learned to deal with mental distress by self-medicating with drugs and alcohol, which eventually led to addiction.*

Appellant's App. at 117-18 (emphases added).

It is difficult to discern from the transcript how much of Dr. Wendt's seven-page, single-spaced report the court was able to review while simultaneously conducting the

sentencing hearing. *See* Tr. at 26 (upon receiving a copy of the report, the court stated: "Why don't you give me a couple minutes and see if there's something here that jumps out."). If the court read the portion indicating that while in prison Ezra was not provided with the mood-stabilizing medication that would address the impulsivity and poor judgment associated with bipolar disorder, the court did not mention it. The court also made no reference to the probation department's sentencing recommendation below:

> This Officer respectfully recommends the Court accept the plea agreement and sentence [Ezra] to three (3) years with six (6) months executed in the Indiana Department of Correction and two and one-half (2 ½) years suspended on probation (one and one-half (1 ½) years supervised and one (1) year unsupervised) to include the following conditions:
> 1) One (1) year House Arrest with the Tippecanoe County Community Corrections Program and pay for said program.
> 2) Waive her Fourth Amendment Rights and submit to random drug screens at the request of the Probation Department or Tippecanoe County Community Corrections and pay for said screens,
> 3) Complete a substance abuse assessment and follow all recommendations,
> 4) Counseling as Ordered by the Court or recommended by the Probation Department,
> 5) Reimburse the Public Defender as ordered by this Court, and
> 6) Payment of restitution as ordered by this Court.

Appellant's App. at 92.

When determining a sentence, a court is not required to follow the recommendation of the probation department. *But see Taylor v. State*, 840 N.E.2d 324, 342 (Ind. 2006) (finding the recommendation in the presentence report "significant" in remanding for a new sentencing statement). Likewise, a court is not obligated to follow the recommendations of

an expert.[4] Rather, the goal is for a court to devise a sentence that is appropriate in light of the nature of the offense and the character of the offender.

To recap, Ezra exhibited extremely poor judgment in not providing information to the SSA in order to continue receiving benefits checks; the checks in turn were cashed and used to pay bills. Ezra made these decisions when she was not provided with the mood-stabilizing medication needed to combat the poor judgment and impulsivity that characterizes her serious mental illness – ironically, the same mental illness that qualifies her to receive those benefits. I would conclude that Ezra's failure to inform does not demonstrate a character of such "recalcitrance or depravity" that clearly cries out for a maximum sentence. *Hollin v. State*, 877 N.E.2d 462, 465-66 (Ind. 2007). In reaching this conclusion, I do not condone welfare fraud nor do I mean to decriminalize or excuse Ezra's nonviolent crime of omission. In light of the circumstances presented here, I cannot say that Ezra is one of the worst offenders deserving of a fully executed three-year sentence for her class D felony conviction.

In sum, while the trial court may have acted within its lawful discretion in determining Ezra's sentence, we are authorized to review the duration of a sentence as well as the place that a sentence is to be served. *Id.* at 465 (citing *Anglemyer*, 868 N.E.2d at 491, and *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)); *Biddinger*, 868 N.E.2d at 414. I would exercise our independent appellate authority, as implemented through Rule 7(B), and hold that Ezra's fully executed three-year sentence is inappropriate given the nature of the

[4] Although when, as in Ezra's case, the court has specifically requested the expert's analysis, and when no conflicting expert testimony is introduced, it is surprising for the court to completely disregard it. *Cf. Haviland v. State*, 677 N.E.2d 509, 516 (Ind. 1997) (concluding that court reasonably gave no weight to defendant's mental condition and background where record contained conflicting expert testimony about

offense and her character. *See Westlake v. State*, --- N.E.2d ---, 2008 WL 4307447 (Ind. Ct. App. Sept. 23, 2008) (holding 14 year sentence inappropriate for recently diagnosed bipolar defendant with a "relatively minor" history, who pled guilty to B felony dealing cocaine and C felony neglect of dependent, began receiving excellent treatment, and responded very well)[5]; *see also Pagan v. State*, 809 N.E.2d 915, 928 (Ind. Ct. App. 2004) (concluding that maximum sentence was inappropriate where young defendant had nonviolent criminal history and offense was no worse than elements of crime; "Neither this offense nor this offender appear to fall into the 'worst' class."), *trans. denied*.

I would reverse and remand with instructions to enter a sentence of eighteen months, the advisory sentence. *See Reid v. State*, 876 N.E.2d 1114, 1117 (Ind. 2007) (concluding that maximum sentence of fifty years was inappropriate for conviction of conspiracy to commit murder where crime caused no danger to victims, and considering defendant's youth, mental health problems, and nonviolent criminal history; "advisory sentence of thirty years is more appropriate"); *Hollins*, 877 N.E.2d at 465-66 (revising defendant's forty-year sentence for burglary to the advisory term of ten years, plus an additional ten years for a habitual offender enhancement). In addition, I would strongly encourage the court, in deciding how much of the sentence should be suspended, to incorporate as many of Dr. Wendt's and the probation

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whether defendant might be faking mental condition).

[5] Westlake had been charged with four counts of class A felony dealing in cocaine, class A felony possession of cocaine, class D felony possession of marijuana, and two counts of class C felony neglect of a dependent. After thoughtfully applying Appellate Rule 7(B), the *Westlake* majority remanded the case with instructions to vacate the defendant's sentence and impose a sentence of seven years imprisonment for class B felony dealing in cocaine and a concurrent three-year term for class C felony neglect of a dependent for an aggregate term of seven years imprisonment. The majority further instructed that two years of the sentence be suspended, one to supervised probation, and one to unsupervised probation with credit for time served, and the executed portion of the sentence be served in community corrections.

department's treatment recommendations and conditions as possible. Such a customized approach would be more effective than simply sending Ezra back to the facility that did not provide her with the necessary mood stabilizing medication for her well-documented severe mental illness.[6] An individualized solution that at least attempts to address Ezra's bipolar disorder and her related criminal behavior would better comport with the reformative goals of our criminal justice system, thus hopefully decreasing the odds of future criminal behavior.

Therefore, I respectfully dissent.

[6] Unfortunately, Ezra is not alone. According to the Department of Justice, sixteen percent of the prison population can be classified as *severely* mentally ill, meaning they fit the psychiatric classification for schizophrenia, major depression, and bipolar disorder. *See* Hwww.pbs.org/wgbh/pages/frontline/shows/asylums/etc/faqs.htmlH (last visited Sept. 25, 2008). These numbers are believed to be the result of deinstitutionalization that began in the 1950s, coupled with the lack of resources and commitment to a community-based system of care. *Id*.